

BEFORE THE  
SPECIAL EDUCATION DIVISION  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

OAH No. 2005120547

vs.

NEWPORT-MESA UNIFIED SCHOOL  
DISTRICT

Respondent.

**DECISION**

Administrative Law Judge Darrell L. Lepkowsky, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter in Costa Mesa, California on February 7, 2006. The sole issue calendared for consideration was whether petitioner (Student) was a resident of the Newport-Mesa Unified School District (Newport-Mesa or District) during the time periods at issue in the Request For Due Process Hearing filed on Student's behalf on December 14, 2005.

Paul M. Roberts and Ellen L. Bacon of Roberts, Adams & Jewell, represented Student. Although Student did not attend the hearing, Student's mother was present during the proceedings.

Attorney Diane M. Willis of Parker & Covert LLP represented Newport-Mesa. Diana Hernandez, Director of Special Education for Newport-Mesa, was also present during the proceedings.

In evidence are the following exhibits: District's exhibits 1 through 21, inclusive<sup>1</sup>, 23, 25, 28<sup>2</sup>, 29, 30, and 33 through 36, and Student's exhibits A through M, inclusive<sup>3</sup>, O, P, R,

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<sup>1</sup> Exhibit 1, an IEP from the Capistrano Unified School District dated June 22, 2005, was admitted solely for purposes of identifying Student's address and telephone number at the time of the IEP.

S, and U through YY, inclusive. The record was left open to receive written factual closing arguments of the parties, which were submitted on February 14, 2005. The record was then deemed closed and the matter submitted as of that date only as to the issue of Student's residency.

Based upon the exhibits admitted into evidence and the testimony of the witnesses, as elaborated below, the ALJ finds that Student was a resident of the Newport-Mesa Unified School District during the time in question and therefore eligible for Special Education services from that District.

## ISSUE

Since September 7, 2005, has Student been a resident of the Newport-Mesa Unified School District for purposes of determining whether Newport-Mesa was responsible for providing special educational services to Student?

## PROCEDURAL HISTORY

Student filed a Request For Due Process Hearing (complaint) on December 14, 2005, alleging that he has been diagnosed with autism and previously has been found eligible for special education services. Student alleged that he moved from the Capistrano Unified School District into Newport-Mesa when his family rented an apartment in the latter school district. Student further alleged that Newport-Mesa disputed his residency in their school district and refused to provide him with an Individualized Education Plan (IEP) team review and special education services, thereby denying him a free and appropriate public education.

On December 23, 2005, Newport-Mesa filed a motion to dismiss the complaint contending that Student did not reside in the District at the time Parents enrolled him in school.

In response to the motion to dismiss, and because Student's residency is a jurisdictional issue that is a prerequisite to a finding of any obligation to provide services to him by Newport-Mesa, OAH issued an Order to Show Cause regarding Student's residency, directing that the parties brief the issue and submit evidence in support of their positions. Finding that the briefs and other materials submitted in response to the OSC did not resolve the residency issue, OAH set the matter for an evidentiary hearing on the sole issue of

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<sup>2</sup> Exhibit 28, an undated account detail from Edison, was admitted only to demonstrate that an account was opened by Student's mother.

<sup>3</sup> Exhibits G and H were admitted only for the residency issues addressed in the letters.

Student's residency. The burden was on Student to prove his residency within the Newport-Mesa Unified School District.<sup>4</sup> This hearing ensued.

## FACTUAL FINDINGS

1. Student was born on November 3, 1994. At the time of the hearing on February 7, 2005, he was just over eleven-years-old and in the sixth grade. Student suffers from autism and has previously been found eligible for special education services. Student began receiving special education services from the Capistrano Unified School District at least as early as October 6, 1997 based upon his diagnosis of autism which adversely affects all of Student's academic, social, behavior, and language areas.

2. Student's Mother is a dentist who has maintained a dental office in Newport Beach since 1998. Sometime in the spring of 2005, she and Student's Father decided to move to the Newport Beach area. Mother was motivated to move because her office was in Newport Beach, a caregiver used by the family for respite care was located there, and that city was closer to the educational programs for Student. Sometime in August of 2005, Mother followed through with her plans to move into the area of Newport Beach. She placed her home for sale; escrow instructions dated August 9, 2005, indicated that escrow was to close on the sale of her home in San Clemente no later than September 8, 2005. Mother also placed an offer on a home in Newport Beach around the same time as the house in San Clemente was sold.

3. Neither the sale of her San Clemente home nor the purchase of the Newport Beach home went as planned by Mother. The sale of her San Clemente house fell out of escrow. Mother cancelled the escrow on the Newport Beach home she was going to purchase when asbestos was discovered during an inspection of the property. The family still planned, however, to move to Newport Beach and to look for another home to purchase there. By letter dated August 22, 2005, Parents notified the Capistrano School District of their intent to move out of that school district. Mother began looking for an apartment to move into that was located in the Newport-Mesa school district so that she and Student could live in the district while she searched for and moved into another house in the same area. Mother found a one-bedroom apartment located in Newport Beach and signed a month-to-month lease in early September, 2005, with her tenancy scheduled to begin on September 6, 2005. The only occupants of the rental apartment were to be Mother and Student. Father was to remain at the house in San Clemente and only stayed at the Newport Beach apartment as a guest.<sup>5</sup>

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<sup>4</sup> Several other motions were filed by the parties prior to the hearing on February 7, 2005, including a Motion to Compel Respondent to Identify Potential Witness, which was filed by Student on January 24, 2006. This motion was withdrawn by Student at the hearing on February 7, 2005.

<sup>5</sup> At hearing, the District put some emphasis on the fact that Father was neither a signatory to the apartment lease nor a resident of the apartment. However, Mother was the sole owner of the home in San Clemente and was the sole buyer of both the original and ultimate home purchased in the Newport Beach area. The fact that Father

4. Mother rented the apartment in Newport Beach because she was not certain how long it would take to ultimately sell her house in San Clemente and how long it would take her to find another house in the Newport Beach area. The apartment she rented was only a few minutes from her office. She and Student moved into the apartment in early September, 2005, soon after signing the lease. Two of Mother's employees, who are also friends of hers, helped her move furniture and other items from the San Clemente house into the apartment. They moved clothing, a queen-sized mattress set, a twin daybed, a kitchen table and chairs, kitchen utensils and items, a television, VCR and DVD, items for the bathroom, and food. The husband, son, and daughter of one of the friends also helped with the move, which necessitated a couple of days to complete. Both of these friends visited the apartment many times while Mother and Student were living there. Mother and Student spent about five nights a week at the apartment. They would go to the San Clemente house one or two nights a week. Mother would arrange to be there when she had her day off on Wednesdays. Mother would also have to be at the house in San Clemente when workmen were scheduled since she was having repairs done in anticipation of eventually being able to sell the house as planned.

5. Mother registered Student at the home school in Newport Beach on September 7, 2005, just after signing the apartment lease. She also instituted phone and electric service at the apartment, ultimately registered to vote using that address, and provided the address as her residence so that mail could be delivered to her there rather than in San Clemente. The apartment address was also given as the home address on subsequent documents filed with Newport-Mesa, including IEPs. The apartment lease initially did not contain the landlord's signature; that was remedied on September 20, 2005, when another lease was signed by both the landlord's representative and Mother.

6. An administrative IEP meeting was held with District representatives and Parents on September 14, 2005. After the meeting, District, through its Special Education Coordinator, wrote to Mother at the Newport Beach apartment to inform her that the District had not confirmed Student's residency in the Newport-Mesa School District. Mother was directed to provide supporting residency documents to the home school before an interim placement offer for Student could be made. Mother provided utility bills for the apartment. Residency was not an issue at the IEP meeting held on October 4, 2005. Subsequent to that IEP meeting, a 30-day offer of interim placement for Student was made by the District to Mother.

7. The placement issues concerning Student were not resolved by the October 4, 2005 IEP meeting. As of November 30, 2005, they were still not resolved. Neither, however, was Student's residency disputed at that point, as evidenced in a letter of that date from the District's Special Education Coordinator to counsel for Student. The District

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was not involved in any of these financial transactions appears to be a family personal choice. These financial arrangements have no bearing on the residency of Mother and Student since Student was spending the majority of his time with Mother at the apartment in Newport Beach.

apparently became suspicious that Student and his mother were not residing within its boundaries some time in very late November or very early December of 2005. Several factors roused the suspicion of District employees: 1) The Student's family was maintaining two residences: the apartment in Newport Beach and the house in San Clemente; 2) Father had not moved into the apartment; 3) The apartment lease was on a month-to-month basis and there were irregularities when the lease was first signed; 4) The electric bill was very low; 5) District employees surmised that as Mother was a dentist earning a good salary and accustomed to living in a large, expensive home, she probably would not move into a very small apartment in a questionable area of town; and 6) Mother claimed the homeowner's exemption for her house in San Clemente at the same time she had supposedly changed her residence to Newport Beach.

8. The District conducts several residency checks a year in situations where there is a suspicion that a student is not properly residing within the District's boundaries. The District is justifiably concerned that educational services only be provided to those to whom they are entitled. This is especially true where a district, such as Newport-Mesa, is perceived as having resources that may not be available in less affluent areas. Based on its suspicions and concerns, the District decided to conduct a residency check for Student to confirm whether he and his mother, were, in fact, living within the District's boundaries.

9. The District's Director of Special Education visited the house in San Clemente on three occasions. The first visit, at about 7:30 in the morning, was in late November. The Director remained outside the home and did not speak with anyone. She saw a man come out of the garage with a backpack which he placed in a car. A boy then joined him in the car and they left. The Director later found out that the boy was Student and the man his Father. She returned to the house in San Clemente on December 6, 2005 again at around 7:30 a.m. but only saw Father. Her last visit to the San Clemente house was on December 7, 2005 at around 8:00 a.m. The Director saw Father come out of the house with Student. She introduced herself to Father and let him know that she was doing a residency check.

10. Later in the week of December 7, 2005, the District's Director of Special Education went to Student's apartment in Newport Beach to do another residency check. She was accompanied by the District's Director of Student Services. They arrived in separate cars about 3:30 p.m. They were let into the apartment by another woman who was there. There was also a second woman in the apartment in addition to Mother. The women were Mother's employees (who are also her friends) who were visiting with her for the afternoon. The District's employees were asked into the apartment but did not go past the entryway. They saw that the apartment was small and that there was a daybed or couch set up in the living room. The dishwasher was running; it was turned off at some point due to the noise level which interfered with conversation. The District employees asked to see into the hall closet, which was then opened for them. They saw some shoes and clothes hanging in the closet. An artificial Christmas tree, about four feet tall, was set up in the corner of the living room area. There was a television in the living area as well. The District employees did not notice much on the kitchen counters which were visible from the entryway of the apartment. However, they were only in the apartment for about five minutes. They both saw

a mattress set up in the bedroom through the opened bedroom door. Neither of the District employees asked to view inside the bedroom or bathroom, to see inside the kitchen cupboards or refrigerator, or to look inside the bedroom closet.

11. The District's Director of Operations for Special Education visited the apartment sometime in early December at about 7:00 a.m. No one answered her knock. She waited another half hour, knocked again, and again no one answered. There were no items, such as toys, in the apartment's patio area.

12. The morning after his afternoon visit to the apartment with the District's Director of Special Education, the Director of Student Services returned to visit the apartment with the District's Director of Operations for Special Education. Mother answered the door that morning. Student was engrossed in watching television. Father was also there. The whole family had spent the previous night at the apartment.

13. Student's family was not informed in advance of any of the residency checks. Of the five residency checks conducted by District employees where someone from the family was seen on the premises, Mother was at the apartment on two occasions, Student was at the San Clemente house on two occasions, and only Father was seen at the San Clemente house on one occasion. No one answered the door on one occasion when a District employee went to the apartment. These were the only residency checks to which any District witnesses testified and amount to only 6 days out of the approximately 120 days that the apartment was rented between September 7, 2005 and early January of 2006 when escrow closed on the home Mother purchased in Corona Del Mar, within Newport-Mesa's boundaries.

14. Student's behavior as a result of his autism includes jumping on beds which resulted in Mother's decision to not have her mattresses on a bed frame. Student's autism also has resulted in his lack of desire to play with toys.

15. Mother intended to move to the Newport Beach area, made that clear to both school districts, placed her house in San Clemente for sale, rented an apartment in Newport Beach to have continuity for her son and a residence close to her work, and then bought a permanent residence in the same area. The ALJ finds that at all times pertinent to this case Mother resided in Newport Beach, that she had no intent to return to reside at her house in San Clemente, and that she had no intent to mislead the Newport-Mesa Unified School District.

#### APPLICABLE LAW

1. Residency under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §1400 et seq.) is measured by "normal standards." (*Union School Dist. v. Smith* (1994) 15 F.3d 1519, 1525.) In California, Government Code section 244 lists "the basic

rules generally regarded as applicable to domicile [legal residency].” (*Fenton v. Board of Directors* (1984) 156 Cal.App.3d 1107, 1114.) In *Smith v. Smith* (1955) 45 Cal.2d 235, 239, the California Supreme Court explained:

Courts and legal writers usually distinguish “domicile” and “residence,” [b]ut statutes do not always make this distinction in the employment of those words. They frequently use “residence” and “resident” in the legal meaning of “domicile” and “domiciliary,” and at other times in the meaning of factual residence or in still other shades of meaning. . . . [I]n our codes “residence” is used as synonymous with domicile in the following statutes: sections 243 and 244 of the Government Code . . . .

2. Government Code, section 244, states in relevant part:

In determining the place of residence [domicile] the following rules shall be observed:

- (a) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose.
- (b) There can only be one residence.
- (c) A residence cannot be lost until another is gained.
- (d) The residence of the parent with whom an unmarried minor child maintains his or her place of abode is the residence of such unmarried minor child. [¶] . . . [¶]
- (f) The residence can be changed only by the union of act and intent. [¶] . . . [¶]

3. Case law, developed over many years, emphasizes intent as a crucial factor in the legal definition of residency. *Union School Dist. v. Smith, supra*, 15 F.3d at p. 1525, is instructive on the issue of intent. There, parents who were residents of the city of San Jose, placed their child at a non-public school in Los Angeles. The school district argued that the child “resided” in Los Angeles during the week while attending a school Clinic there and, therefore, the Union School District was not responsible for the child’s education. The Ninth Circuit found otherwise. The parents were only temporarily in Los Angeles during the school week and did not intend to move there permanently as evidenced by the father’s maintenance of his medical practice in San Jose and the maintenance of parents’ permanent home there. The parents’ intent, therefore, was to remain residents of San Jose and their actions supported that intent. So too did Mother’s actions in the instant case evidence her intent to live in Newport Beach.

4. The theme of intent resounds in other California cases addressing the issue of residency. In *Eriksen v. Eriksen* (1943) 57 Cal.App.2d 532, 534-535, the court stated:

In order to effect a change of residence, there must be a concurrence in the act of abandonment of one residence with the intent to establish a new residence elsewhere. It is mainly a question of intent, which may be shown by the testimony of the parties, considered in connection with the surrounding circumstances, plus corroboration when essential.

This theme was continued in the case of *Michelman v. Frye* (1965) 238 Cal.App.2d 698, 704, where the court stated that “Absence from one’s permanent residence, if all the while he intends the absence only for a special temporary purpose and to be followed by resumption of the former residence, constitutes neither abandonment thereof nor a change of residence.”

Finally, in the case of *Demiglio v. Mashore* (1992) 4 Cal.App.4th 1260, the court held: “We pointed out in our first opinion that the concept of a temporary versus permanent move has to do with the territorial jurisdiction, not the actual dwelling place: ‘[T]he notions of permanency and an intention to remain which attach to the domicile concept have nothing to do with the actual dwelling, and everything to do with the actual place or location.’ ” (*Id.* at pp.1269-1270.)

5. The IDEA speaks in terms of a local education agency “providing for the education of children with disabilities within its jurisdiction.” (20 U.S.C. § 1413(a)(1).) California law requires students to attend the public school “in which the residency of either the parent or legal guardian is located.” (Ed. Code § 48200.) Under both federal and state standards, Student’s legal residency, gained through his mother with whom he was residing for the majority of the time, was within Newport-Mesa’s boundaries during the time period in question in the complaint, beginning approximately September 7, 2005. (See Applicable Law, paragraph 1.)<sup>6</sup>

## LEGAL CONCLUSIONS

1. While the factors that roused District’s suspicions concerning Student’s residency, as listed in Factual Finding number 7, above, gave District a valid basis for pursuing a residency check of Student and his family, District’s suspicions are not supported by the entirety of the evidence. In the final analysis, and based upon Factual Findings in

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<sup>6</sup> The ALJ notes that Student also had an alternative claim to residency within the Newport-Mesa boundaries. His mother has maintained her place of business there since 1998. California Education Code section 48204 (b) states that “A school district may deem a pupil as having complied with the residency requirements for school attendance in the school district if one or both the parents or legal guardians of the pupil is employed within the boundaries of that school district.” Admittance to the district is not automatic under this section, and school districts have statutory bases for denying admittance. (Ed. Code, § 48204, subd. (b)(2), (3) & (4))



paragraphs 2 through 6, 10, 12, 14 and 15, the District's case is composed of assumptions that are not supported by any *evidence* that supports the assumptions.

2. It is entirely logical that someone in the process of looking to purchase a permanent residence would only sign a month-to-month lease in order to be able to move as soon as the permanent residence was ready. Based upon Factual Findings in paragraphs 2, 3, 4, 5, 6, 10 and 12 it is found that the apartment was not intended as the family's permanent residence. However, it was a transitional residence rented by Mother for her and Student to live in while Mother searched for another house in the same area to replace the one she had originally intended to buy. Based upon Factual Findings 2, 3, 4, 5, 6, 10 and 12, Mother and Student lived at the apartment for at least five of seven days of the week.

3. Following the same reasoning, it would not be logical for someone waiting to sell one house and immediately purchase another to simultaneously rent an expensive house or apartment for what was intended to be just a few months. Based upon Factual Findings 2 through 6, 10, 12, 14 and 15, all evidence indicates that Student's family had every intention, since at least the summer of 2005, of purchasing a house in and permanently residing in the area of Newport Beach. The District provided no evidence to contradict Mother's credible assertions as to her intent, since at least the summer of 2005, to permanently move to the Newport Beach area. The District's assumption that Mother, as a highly-paid professional, would only live in an expensive house, albeit if it was only for a short period of time, was also contradicted by Mother's testimony that she had lived in a two-bedroom house prior to purchasing her large home in San Clemente.

4. While the dollar amounts of the electric bills put in evidence are admittedly low, no evidence was offered as a point of comparison as to what the bills *should have been*, according to the District, based upon two people living in a small apartment five or six days a week. Therefore, there is no point of comparison and the dollar amounts of the electric bills offered into evidence have not been given much weight by the ALJ.

5. The District employees' belief that the apartment was too sparsely furnished to support residency also is not persuasive. First, there is no indication that Mother and Student could not live sufficiently with what was moved into the apartment. Second, Mother never contended that the apartment was meant to be a permanent abode. Rather, she credibly testified -and the evidence supports - that the apartment was meant to be a transitional residence between selling one home and purchasing another. Mother also credibly testified that she brought enough items to live with for the time she and Student would be living in the apartment. There was no evidence that she was accustomed to using more than that. Finally, none of the District employees checked the bathroom, kitchen or bedroom to ascertain whether items for day-to-day living were stored there. Therefore, based on the credible testimony of Mother and her witnesses as described in Factual Findings paragraphs 4 and 10, the ALJ finds that the apartment, even though sparsely furnished, was being inhabited by Student and Mother.

6. The same analysis also applies to Mother's decision to rent-back the San Clemente house. District appears to argue that to prove true residency in Newport Beach, Mother should have moved the contents of the San Clemente house into storage when escrow closed and then moved the contents out of storage and into the newly-purchased home in Corona Del Mar less than a month later. Not only would that be disruptive to the family – and, particularly, to an autistic child, as pointed out by Mother – but it is somewhat illogical for anyone to contemplate that course of action unless no other alternative was available.

7. So too does the lack of toys in the apartment or on the patio impact on the ALJ's finding of residency. The apartment was a temporary setting. Further, as based on Factual Findings paragraph 14, Student did not generally play with toys given his autism.

8. The taking of the homeowner's exemption also fails to prove Mother's residency remained in San Clemente. First, District did not offer any evidence of *when* Mother filed for the exemption. Based upon Factual Findings paragraph 3, Mother is found to have lived in the San Clemente house for eight months prior to moving to Newport Beach. The Homeowner's exemption could have been claimed during those eight months. Second, District offered no evidence regarding whether the exemption is available to someone who does not live in a home for four of twelve months or if it is equally unavailable if the homeowner moves from the home but does not rent it out. Finally, even if Mother improperly claimed the exemption, that is not an issue over which this administrative tribunal has jurisdiction.

9. Based upon Factual Findings paragraphs 2 through 6 and 10, 12 and 15, and Applicable Law paragraphs 1 through 5, Student and Mother demonstrated no intent to reside at the house in San Clemente subsequent to September 6, 2005 or to ever resume residency there. Mother confirmed the intent to move permanently to the Newport Beach area by communicating this intent to various public officials, renting and moving into another residence, setting up utilities at the new address, changing her address for voter's registration purposes, using the new address to receive mail and, finally, following through with her intent to purchase a new home in the Newport-Mesa school district. Even though the apartment she rented in Newport Beach was admittedly temporary, Mother's intent to move permanently to the Newport Beach area did not waiver. She therefore had the requisite intent to change her legal residency. Mother's actions emphasize the dictates of Government Code section 244, subdivision (f) that: "The residence can be changed only by the union of act and intent." Mother's intent was always to move to the Newport Beach area and her actions support that intent.

10. Based upon Factual Findings paragraphs 2 through 6, 10, 12, 14, and 15, Applicable Law paragraphs 1 through 5, and Legal Conclusions paragraphs 1 through 9, since approximately September 7, 2005, Student has been a legal resident and domiciliary of the Newport-Mesa Unified School District and therefore has been and is entitled to receive educational services from that school district.

## ORDERS

1. Newport-Mesa's motion to dismiss the complaint based on lack of residency of Student in that district is denied.

2. Within five business days of receipt of this decision, the Parties shall contact the Irvine office of the Office of Administrative Hearings in order to schedule a trial setting conference.

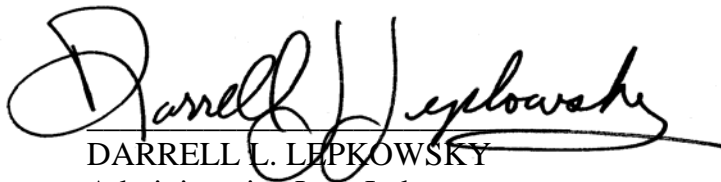
## PREVAILING PARTY

Student is the prevailing party in this matter on the sole issue of residency. (Ed. Code, § 56507, subd. (d).) The substantive issues raised in the complaint filed December 14, 2005 still remain to be resolved.

## RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

DATED: March 2, 2006

A handwritten signature in black ink, appearing to read "Darrell L. Lepkowsky", is written over a horizontal line.

DARRELL L. LEPKOWSKY  
Administrative Law Judge  
Special Education Division  
Office of Administrative Hearings